



## Case Western Reserve Law Review

---

Volume 35 | Issue 2

---

1984

# The Statutory Will: A Simple Alternative to Intestacy

Gregory V. Mersol

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

---

### Recommended Citation

Gregory V. Mersol, *The Statutory Will: A Simple Alternative to Intestacy*, 35 Case W. Res. L. Rev. 307 (1984)  
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol35/iss2/6>

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

## THE STATUTORY WILL: A SIMPLE ALTERNATIVE TO INTESTACY

*In testamentary planning, cost and complexity are obstacles for a significant number of testators. Although the statutory will is an appropriate response to these problems, there is no universal approach to its structure. Indeed, the various statutory will proposals as a group encompass many objectives and represent a number of distinct approaches. By comparing four current proposals and testing the strengths and weaknesses of each, this Note suggests that an appropriate statutory will is one which is adaptable, within limits, to a variety of testamentary situations and which consciously addresses and resolves the problems inherent in the traditional approaches.*

### INTRODUCTION

THE STATUTORY will is a legislative attempt to ease the increasing cost and complexity of testamentary planning by permitting and encouraging briefer forms for wills. This effort may involve the creation of simple alternatives to intestacy, shorthand methods for writing wills, or both. A well-drafted statute not only should streamline the writing of wills, but also should strike an intelligent balance between several potentially conflicting concerns.

Part I of this Note describes four statutory will systems: the California Statutory Wills section of the California Probate Code (hereinafter CSW);<sup>1</sup> the Uniform Statutory Will Act (USWA);<sup>2</sup> drafts of three proposed uniform acts by the ABA Committee on Fiduciary Services for Small Estates and Conservatorships, Probate and Trust Division (hereinafter 1980 ABA Committee Draft), which in combination form a comprehensive statutory will proposal;<sup>3</sup> and

---

1. CAL. PROB. CODE §§ 56-56.14 (West Supp. 1984); *see infra* notes 13-51 and accompanying text for detailed discussion of the CSW. There is also an Ohio proposal based on the California model. *See* H.B. 483, 115th Gen. Assembly, Reg. Sess. (1983). However, the somewhat different language of the Ohio proposal might create aberrational results. *See infra* note 29.

2. UNIF. STATUTORY WILL ACT (1984); *see infra* notes 53-106 and accompanying text for detailed discussion of the USWA. As of this writing, the National Conference of Commissioners on Uniform State Laws has not published comments to its final draft of the USWA.

In 1983, the Commissioners issued a USWA Discussion Draft, containing both proposed statutes and comments. UNIF. STATUTORY WILL ACT (Discussion Draft 1983) (on file with the *Case Western Reserve Law Review*). This Note occasionally examines the USWA Discussion Draft, but only for the purpose of suggesting alternatives to current proposals and statutes; the authors of the Discussion Draft intended that it not be used to ascertain the purpose underlying the USWA as finally approved by the Commissioners.

3. The 1980 ABA Committee Draft is set forth in the appendices to *Proposed Uniform Acts for a Statutory Will, Statutory Trust and Statutory Short Form Clauses*, 15 REAL PROP.,

the English statutory will provisions.<sup>4</sup>

Part II examines the contributions each proposal makes in light of the objectives which legislatures typically seek to accomplish through the statutory will mechanism.<sup>5</sup> These objectives include providing a usable format, worthwhile substance, and viable alternatives to intestacy. In turn, this Note assesses whether the provisions of each Act are broad enough in scope to permit wide application,<sup>6</sup> whether they are desirable to the public,<sup>7</sup> whether they are well-drafted,<sup>8</sup> and finally, whether they are acceptable to the legal profession.<sup>9</sup>

Part III discusses the difficulties inherent in drafting a statutory will.<sup>10</sup> It also proposes changes in the form and substance of the Acts<sup>11</sup> and suggests other means to achieve the goals typically sought by legislatures that enact statutory will systems.<sup>12</sup>

## I. DESCRIPTION OF THE FOUR PROPOSALS

The four statutory will proposals evince basic differences. The CSW is primarily a printed form will that uses simple language and has a clear structure. The USWA and the 1980 ABA Committee Drafts are more complex and, though they provide a comprehensive scheme, are primarily intended to facilitate the drafting of wills. The English statutory will provisions do not create a comprehensive distribution scheme. Rather, they offer several shorthand methods through which more complex provisions can be incorporated by reference.

---

PROB. & TR. J. 837 (1980) [hereinafter cited as *Proposed Uniform Acts*]; see *infra* notes 107-38 and accompanying text for detailed discussion of the 1980 ABA Committee Draft. The Draft includes a statutory will, UNIF. STATUTORY WILL ACT (ABA Comm. Draft 1980), set forth in *Proposed Uniform Acts, supra*, app. A; a statutory trust, UNIF. STATUTORY CUSTODIANSHIP TR. ACT (ABA Comm. Draft 1980), set forth in *Proposed Uniform Acts, supra*, app. B; and a draft containing short form clauses for wills and trusts and describing fiduciary powers, UNIF. SHORT FORM CLAUSES FOR WILLS AND TR. ACT (ABA Comm. Draft 1980), set forth in *Proposed Uniform Acts, supra*, app. C. The ABA Committee designed the proposals so that states could adopt them separately or together. See *Proposed Uniform Acts, supra*, at 837.

4. Law of Property Act, 1925, 15 Geo. 5, ch. 20, § 179; see *infra* notes 139-49 and accompanying text for detailed discussion of the English Act.

5. See *infra* notes 150-206 and accompanying text.

6. See *infra* notes 152-84 and accompanying text.

7. See *infra* notes 185-95 and accompanying text.

8. See *infra* notes 196-201 and accompanying text.

9. See *infra* notes 202-06 and accompanying text.

10. See *infra* notes 207-09 and accompanying text.

11. See *infra* notes 210-27 and accompanying text.

12. See *infra* notes 228-37 and accompanying text.

### A. *The California Statutory Will*

In enacting the CSW, California became the first American jurisdiction to create a statutory will.<sup>13</sup> This statute gives the testator the choice of a simple will<sup>14</sup> or a will with a trust.<sup>15</sup> Both of the wills are printed in a "fill in the blanks" format and incorporate only the definitions of words and rules of construction.<sup>16</sup>

The will itself begins with eleven warnings to the testator.<sup>17</sup> Although a testator can complete the forms without a lawyer's advice, the warnings suggest legal or other expert consultation for assistance in completing the form,<sup>18</sup> for defining terms,<sup>19</sup> and for more advanced tax planning.<sup>20</sup> Another warning prohibits changes on the will form itself and instructs the testator to use a codicil if he wishes to make any amendments.<sup>21</sup>

The CSW sets forth certain definitions that are to be used in the will. The statute defines a spouse as the testator's husband or wife at the time of execution, regardless of separation.<sup>22</sup> The term "child" includes nonmarital children.<sup>23</sup> When property is to pass to the testator's descendants, distribution is the same as under the Uniform Probate Code.<sup>24</sup> Such distribution entails the division of property at the nearest degree of kinship with surviving issue rather than just at the level of children.<sup>25</sup> The term "survival" is not defined, but is instead left to be determined from other sources of probate law.<sup>26</sup>

The CSW divides the estate into three parts: personal and household items, cash gift, and residuary estate.<sup>27</sup> Under the CSW, the personal and household items pass to the spouse if he or she

---

13. *California First with Statutory Wills*, CAL. LAW., Feb. 1983, at 17.

14. CAL. PROB. CODE § 56.7 (West Supp. 1984).

15. *Id.* § 56.8.

16. *Id.* §§ 56.7-8.

17. *Id.*

18. *Id.* §§ 56.7 notice 1 (will without trust), 56.8 notice 2 (will with trust).

19. *Id.* §§ 56.7 notice 5, 56.8 notice 6.

20. *Id.* §§ 56.7 notice 3, 56.8 notice 4.

21. *Id.* §§ 56.7 notice 4, 56.8 notice 5.

22. "'Spouse' means the testator's husband or wife at the time the testator signs a California statutory will." *Id.* § 56(b). Definitions like this one evince the drafters' attempt to insure simplicity in the statutory will.

23. *Id.* § 56(f). The definition expressly includes children born "out of wedlock." *Id.*

24. *See id.* § 56(i). The corresponding Uniform Probate Code provision is UNIF. PROB. CODE § 2-106 (1982).

25. CAL. PROB. CODE § 56(i).

26. California makes no provision for a time period for survival. *See id.* §§ 220-31.

27. *Id.* §§ 56.7 arts. 2.1-3 (will without trust), 56.8 arts. 2.1-3 (will with trust).

survives; otherwise, the surviving children share equally.<sup>28</sup> If neither the spouse nor any children survive, personal and household items presumably pass to the residuary estate.<sup>29</sup> Under both the simple will and will with trust, the testator may choose to make a testamentary cash gift to a person or charity by filling in the recipient's name and the amount.<sup>30</sup>

The distinction between the simple will and the will with trust is relevant only to the residuary estate. The CSW defines a residuary estate as property not disposed of either as a personal or household item or as a gift.<sup>31</sup> The simple will without trust requires the testator to select one of the three possible clauses. The testator may choose to leave the residuary estate to his spouse or to his descendants should the spouse predecease him.<sup>32</sup> As an alternative, he may choose to leave the residuary estate to his descendants even if his spouse survives.<sup>33</sup> Finally, the testator may choose to have the property distributed according to the intestacy statute at the time of his death.<sup>34</sup>

The statutory will with trust gives the testator only two choices. The first choice leaves the entire residuary estate to the spouse if he or she survives.<sup>35</sup> If the spouse predeceases the testator and at the time of death the testator has children under twenty-one years of age, the estate passes to a trustee in trust. If neither the spouse nor any children under age twenty-one survive, the testator's descendants take the residuary estate.<sup>36</sup> The second choice is identical to the first except that it excludes the spouse in all instances, even when the spouse survives the testator.<sup>37</sup>

The trust terms of the two choices are virtually identical.<sup>38</sup> So long as there is any living child under twenty-one, the trustee is to distribute to the children sufficient principal and interest of the trust

---

28. *Id.* §§ 56.7 art. 2.1, 56.8 art. 2.1.

29. The CSW is silent on this point. *See id.* The different language in Ohio H.B. 483, *supra* note 1, creates an anomalous result. The Ohio bill does not require that the spouse be deceased for the property to pass to the residuary estate when there are no surviving children.

30. CAL. PROB. CODE §§ 56.7 art. 2.2, 56.8 art. 2.2.

31. *See id.* §§ 56.7 art. 2.3, 56.8 art. 2.3.

32. *Id.* § 56.7 art. 2.3(a).

33. *Id.* § 56.7 art. 2.3(b).

34. *See id.* § 56.7 art. 2.3(c).

35. *Id.* § 56.8 art. 2.3(a).

36. *Id.* § 56.11(a)(3).

37. *Id.* § 56.8 art. 2.3(a), (b).

38. *Id.* § 56.11. They differ only regarding omission of the phrase "of my descendants" for the trust excluding the spouse, but inasmuch as this phrase is redundant in the context of the other statutory language, the difference between the trust terms is meaningless.

for their support and education, including college and vocational training.<sup>39</sup> The trustee need not distribute equal shares to the children, and the trustee may take into account each child's actual and potential outside income.<sup>40</sup> When the youngest child reaches the age of twenty-one, the trust terminates.<sup>41</sup> The trustee then distributes the remaining trust funds to the surviving descendants.<sup>42</sup> The will also refers to the trustee's powers and provides a short list of those powers.<sup>43</sup>

The CSW provides space for three persons who may be designated executor, two of whom are named as alternates.<sup>44</sup> Both the simple will and the will with trust recommend that the testator appoint a guardian for any of the testator's children under eighteen years of age.<sup>45</sup> Three persons are named as guardian of the child's property, and three are named as guardian of the child's person.<sup>46</sup> As with the executor, the second two persons named in each case act as alternates, serving only if the person before them is unwilling or unable to act as guardian.<sup>47</sup> The testator designates the trustee in the same manner.<sup>48</sup> The testator may waive the California Probate Code's requirement that the executor, guardian, or trustee post bond.<sup>49</sup>

The CSW is essentially an enacted form will. It is therefore not surprising that it contains declaration and revocation clauses such as an ordinary will might contain.<sup>50</sup> The statutory will also incorporates the definitions of terms and rules of construction contained within the Act.<sup>51</sup> It gives instructions to the witnesses and requires that the witnesses and testator sign in each other's presence.<sup>52</sup>

### B. *The Uniform Statutory Will Act*

The USWA may have the greatest impact of any of the statutory will alternatives. This proposal, designed to work in conjunction

---

39. *Id.*

40. *Id.* § 56.11(a)(2)(A), (b)(2)(A).

41. *Id.* § 56.11(a)(2)(B), (b)(2)(B).

42. *Id.*

43. The powers are listed in *id.* § 56.13(b).

44. *Id.* §§ 56.7 art. 3.1 (will without trust), 56.8 art. 3.1 (will with trust).

45. *Id.* §§ 56.7 art. 3.2, 56.8 art. 3.3.

46. *See id.*

47. *See id.*

48. *See id.* § 56.8 art. 3.2.

49. *See id.* §§ 56.7 art. 3.3, 56.8 art. 3.4.

50. *Id.* §§ 56.7 art. 1, 56.8 art. 1.

51. *Id.* §§ 56.7, 56.8.

52. *Id.*

with the Uniform Probate Code,<sup>53</sup> differs significantly from the California approach. The most striking difference is that the USWA provides no form.<sup>54</sup> It works solely through incorporation by reference so that a testator merely indicates that he wishes his property to be disposed of according to the terms of the USWA.<sup>55</sup> The testator possesses the flexibility to dispose of his property in a manner different than that adopted by the CSW. For example, while the CSW allows a testator to make a will with trust by simply selecting the form for will with trust as opposed to the form for a will alone, the USWA allows him to make a will with trust by expressly excluding the trust provisions.<sup>56</sup> Similarly, the testator may exclude any other USWA provision.<sup>57</sup> Modifications can be made on the will document which incorporates the USWA—no separate codicil is needed as with the CSW.<sup>58</sup> Because the USWA does not use preprinted forms, the testator should include on the document itself a clause declaring the document as his will and revoking any previous will.

The USWA adopts a variety of conventional and nonconventional definitions. For example, the term "spouse" does not include one who separates from the testator either by means of a final or other decree of separation, or by a written separation agreement.<sup>59</sup> Nonmarital children are not the father's children for purposes of the Act unless he openly and notoriously treats them as his children.<sup>60</sup> Adoptees, of course, are treated as children.<sup>61</sup> For distribution by representation, the USWA uses a definition similar to that contained in the Uniform Probate Code.<sup>62</sup> The statute defines the

---

53. This is not expressly stated, but may be implied from the structure of the USWA. See, e.g., *infra* notes 62-64 and accompanying text.

54. The prefatory note to the 1983 USWA Discussion Draft discussed the rejection of a form such as California's.

55. See UNIF. STATUTORY WILL ACT § 3(a) (1984). Section 3(c) of the USWA provides a statement that can be used to incorporate the USWA's provisions: "Except as otherwise provided in this will, I direct that my testamentary estate be disposed of in accordance with the [Enacting State's] Uniform Statutory Will Act."

56. See *id.* § 3(a).

57. *Id.* The USWA is divided into 18 sections, 14 of which are substantive provisions. Section 1 sets forth definitions; § 2, capacity and execution; § 3, incorporation; § 4, shares; § 5, spouse's share; § 6, trust for spouse and issue; § 7, shares when spouse does not survive; § 8, trusts for underaged children; § 9, effect of disability; § 10, powers of appointment; § 11, survival; § 12, appointment of personal representative and trustee; § 13, powers of personal representative and trustee; and § 14, bond.

58. See *id.* § 3(a).

59. See *id.* § 1(7).

60. See *id.* § 1(1).

61. *Id.*

62. Compare *id.* § 1(5) with UNIF. PROB. CODE § 2-106 (1982).

minimum survival period as thirty days,<sup>63</sup> in contrast to the Uniform Probate Code's 120-hour requirement.<sup>64</sup>

Unless the testator specifies otherwise,<sup>65</sup> the USWA provides only one scheme of distribution. The USWA organizes its distribution by first determining the spouse's share and then determining the disposition of the estate should the spouse predecease the testator.<sup>66</sup>

A USWA will conveys the whole statutory will estate<sup>67</sup> to the spouse should the testator leave no surviving issue.<sup>68</sup> If there is surviving issue, the spouse receives all of the testator's residence and tangible property except for personal property held primarily for business or investment purposes.<sup>69</sup> The spouse also receives the greater of \$300,000 or one-half of the balance of the estate.<sup>70</sup> The remaining portion of the statutory will estate passes to a trust,<sup>71</sup> with the spouse receiving the entire net income of the trust.<sup>72</sup>

If the spouse does not survive the testator, distribution follows a different course. If all of the testator's children survive, the property passes equally to them.<sup>73</sup> If not, it goes to the testator's issue by representation.<sup>74</sup> If any issue are under the age of twenty-three, all property distributable to the issue is held in trust.<sup>75</sup> If there is no surviving issue, the intestacy statute determines the property division.<sup>76</sup>

Unlike the CSW, the USWA does not give the testator specific choices.<sup>77</sup> However, it does have remarkable flexibility in other ways. The trust provisions are adaptable to a variety of situations. First, the trusts can be bypassed entirely if their creation would be uneconomical, unless the trustee is a beneficiary of the trust.<sup>78</sup> If

---

63. See UNIF. STATUTORY WILL ACT § 11.

64. UNIF. PROB. CODE § 2-104.

65. See *supra* note 56 and accompanying text.

66. UNIF. STATUTORY WILL ACT §§ 4-9.

67. "Statutory will estate" means the entire testamentary estate, except as the will otherwise provides." *Id.* § 1(6).

68. UNIF. STATUTORY WILL ACT § 5(a)(1).

69. *Id.* § 5(a)(2).

70. *Id.*

71. See *id.* § 5(a)(2)(iii).

72. See *id.* § 6(1).

73. *Id.* § 7(a)(1).

74. *Id.*

75. See *id.* § 8.

76. *Id.* § 7(a)(2).

77. For instance, the CSW permits a testator to exclude his or her spouse. See *supra* note 33 and accompanying text.

78. See UNIF. STATUTORY WILL ACT §§ 5(b), 6(2), 7(b), 8(d), 8(f).



the trust provisions of the USWA are found inappropriate for any reason, they will not be used even though the testator may have failed to exclude them.

Second, the USWA provides separate trust provisions for the spouse and issue,<sup>79</sup> underage children,<sup>80</sup> and disabled issue.<sup>81</sup> One trust provision covers property placed in trust if the spouse and any issue survive the testator.<sup>82</sup> The other trust provisions do not apply unless property is to be distributed directly to an underaged or disabled child.<sup>83</sup>

According to the terms of the trust for spouse and issue, the net income must be paid to the spouse at least quarterly.<sup>84</sup> Further, the spouse may compel the trustee to make unproductive property productive.<sup>85</sup>

When making principal payments to the spouse or issue, the trustee may consider other sources of income and the individual's needs.<sup>86</sup> However, the USWA takes special care to preserve the spouse's interest by providing that the shares of spouse and issue be kept separate<sup>87</sup> and that the spouse may receive principal funds from her share while alive.<sup>88</sup> The trustee may terminate the trust if its continuation becomes uneconomical, and he may charge against a beneficiary any funds received as principal.<sup>89</sup> Where the trustee is a beneficiary, he may not exercise discretion in his favor except in certain necessary instances.<sup>90</sup>

On the death of the surviving spouse, the principal must be paid to the testator's children equally if all survive, to the testator's living issue by representation if one or more children predecease the spouse, or according to the intestacy statute if no issue survive.<sup>91</sup>

If one or more of the children of the testator to whom the property is distributable is under a specific age, special USWA provisions

---

79. *Id.* § 6.

80. *Id.* § 8.

81. *Id.* § 9.

82. *See id.* § 5(a)(2)(iii).

83. *See id.* §§ 8, 9.

84. *Id.* § 6(1).

85. *Id.*

86. *See id.* § 6(2). The statute explicitly states that the special needs of minor or disabled children must be given preference. *Id.*

87. *See id.* At the inception of the trust, the shares of spouse and issue are equal. *Id.*

88. *See id.*

89. *See id.*

90. *Id.*

91. *See id.* § 6(3). Where the recipient is underaged or disabled, that individual's share may remain in trust. *Id.* *See also id.* §§ 8, 9.

become operative.<sup>92</sup> In particular, shares distributable to the testator's issue are held in trust, and primary consideration is given to underaged or disabled children.<sup>93</sup> The trustee is to use the income and principal to provide for the health, education, and other support of the underaged issue.<sup>94</sup> The trustee retains the discretion to pay a beneficiary his entire share, but doing so severs the beneficiary's right to further income or principal payments.<sup>95</sup> When all issue become of age,<sup>96</sup> the trust terminates, and the trustee distributes the principal proportionately just as it would have been on the testator's date of death.<sup>97</sup> The USWA also provides for distribution if a trust beneficiary dies.<sup>98</sup>

The USWA creates a trust for the shares of any distributees, other than a spouse, who are so mentally or physically disabled that they are unable to manage funds properly.<sup>99</sup> The trustee or personal representative decides whether all or part of the funds distributable to that individual should remain in trust. The trust terminates upon removal of the disability or upon death.<sup>100</sup>

Regardless of the type of trust that the circumstances dictate, the USWA gives a trustee the same powers over each of them. The USWA sets out two alternative provisions governing the scope of the trustee's powers.<sup>101</sup> Under the first alternative, the trustee has the powers given him under the enacting state's Trustee's Powers Act.<sup>102</sup> The second expressly gives the trustee twenty-two specific powers.<sup>103</sup> The USWA provides the personal representative with the same powers as the trustee holds.<sup>104</sup> Both alternatives require

---

92. See *id.* § 8(a). The USWA suggests age 23, but the testator may specify another one.

93. *Id.*

94. See *id.* § 8(b). Any unused income may be added to the principal. *Id.*

95. See *id.* § 8(c).

96. *Id.* § 8(d).

97. *Id.* § 8(e). The trustee may deduct amounts already distributed for purposes of health, education, support, or maintenance under § 8(b). *Id.*

98. *Id.* § 9.

99. *Id.* § 9(a). The USWA lists causes of disability as drug abuse, alcoholism, mental illness or deficiency, or other similar causes. See *id.*

100. *Id.* § 9(b). The trust property passes to the previously disabled distributee or to the distributee's estate in the case of death. *Id.*

101. See *id.* § 13 alternatives A, B. The USWA does not say whether the testator may select the alternative he wants, or whether the enacting state's legislature should draft its statutory will act with only one "power" provision.

102. See *id.* § 13(b) alternative A.

103. *Id.* § 13 alternative B. Under this alternative, a trustee may, for example, maintain the property in trust as is, improve the property, abandon worthless property, invest the property, or sell the property. In short, the trustee may perform any act "necessary or appropriate to administer the trust." *Id.*

104. See *id.* §§ 13(a) alternative A, 13(b) alternative B. Besides having the express pow-

that the trustee and personal representative observe a specified standard of care.<sup>105</sup>

The USWA requires neither the personal representative nor the trustee to post bond. The testator may, however, provide otherwise in his will, or a court may require a bond upon the application of any interested person.<sup>106</sup>

### C. *The 1980 ABA Committee Draft*

Like the USWA, the 1980 ABA Committee Draft<sup>107</sup> also uses a system of incorporation by reference.<sup>108</sup> It contains several short form clauses and includes the separate proposed uniform acts which create a statutory will, a short form trust, and a statutory list of trustee powers. The 1980 ABA Committee Draft is an earlier version of the USWA.<sup>109</sup> Though many of its ideas are similar to those in the final product, it nonetheless serves as a useful benchmark against which to assess the development of the uniform statutory will. It also contains a number of interesting ideas that do not appear in the final USWA.

The statutory will section sets forth several definitions that differ from those used in intestacy. The term "survival" means that a person must survive the testator by at least 120 hours, just as in the Uniform Probate Code.<sup>110</sup> The statute declares that the term "child" includes adoptees,<sup>111</sup> but it is silent on the status of nonmarital children. When distribution occurs "by 'representation,'" it is divided per stirpes.<sup>112</sup> The 1980 ABA Committee Draft

---

ers under alternative B, the representative can pay nonobligatory written pledges of the testator. *Id.* § 13(b) alternative B.

105. *Id.* § 13(c) alternatives A, B (standard of care is that of "a prudent person dealing with property of another").

106. *Id.* § 14.

107. *See supra* note 3 and accompanying text.

108. UNIF. STATUTORY WILL ACT § 2-102 (ABA Comm. Draft 1980); UNIF. STATUTORY CUSTODIANSHIP TR. ACT § 2-102 (ABA Comm. Draft 1980); UNIF. SHORT FORM CLAUSES FOR WILLS AND TR. ACT § 2-102 (ABA Comm. Draft 1980).

109. *See* UNIF. STATUTORY WILL ACT § 1-101 (ABA Comm. Draft 1980).

110. *Id.* § 3-106; UNIF. PROB. CODE § 2-104 (1982).

111. UNIF. STATUTORY WILL ACT § 3-109(3) (ABA Comm. Draft 1980).

112. *Id.* § 3-109(4). Distribution per stirpes typically occurs in the following manner:

[T]he estate is first divided into the number of shares indicated or determined by the number of children of the ancestor who survived or who leave issue who survived. If property is to pass to issue, per stirpes, of the intestate's parents, the first division would be by the number of children or parents (other than the intestate) who left issue surviving even though no person of this generation survives.

ASSOCIATION OF CONTINUING LEGAL EDUCATION ADMINISTRATORS, UNIFORM PROBATE CODE PRACTICE MANUAL § 1.9 (1972). For a discussion of the differences between per stirpes distribution and the Uniform Probate Code, see *id.*

does not define the term "spouse." Thus, if a Uniform Probate Code jurisdiction were to enact the 1980 ABA Committee Draft, the term "spouse" would be defined by the Uniform Probate Code, and therefore would not include bigamous spouses and spouses for whom an attempted divorce was invalid.<sup>113</sup>

The statutory will section also provides a distribution plan. This section initially sets forth one scheme of distribution affecting the surviving spouse's share and provides a similar scheme for community property jurisdictions.<sup>114</sup> Generally, where all the surviving issue are also issue of the surviving spouse, the entire testamentary estate passes to the spouse.<sup>115</sup> If the value of the estate exceeds \$250,000, however, the spouse receives the testator's residence and personal property, except for investments, liens, and similar named possessions.<sup>116</sup> The spouse also receives one-half of the balance of the estate.<sup>117</sup> The balance, after the spouse's deduction, passes to a trust.<sup>118</sup> The spouse receives a life interest in the income from the trust and the testator's issue are the remaindermen.<sup>119</sup>

Where one or more surviving issue are not also issue of the spouse, the spouse receives only half the estate.<sup>120</sup> The share not given to the spouse is divided equally among the children of the testator if all of them survive. If not all the children survive, the property passes to the surviving issue of the testator by representation. If all the issue predecease the testator, the estate passes according to the intestacy statute.<sup>121</sup>

When funds go into trust for the spouse, the net income is paid at least quarterly during the lifetime of the spouse.<sup>122</sup> Upon the spouse's death, the principal is distributed equally to the testator's children and by representation to the children of deceased children.<sup>123</sup> If none of the testator's issue are living, property is distributed according to the intestacy statute.<sup>124</sup>

The short form trust section of the 1980 ABA Committee Draft

---

113. See UNIF. PROB. CODE § 2-802.

114. See UNIF. STATUTORY WILL ACT § 3-102 (ABA Comm. Draft 1980).

115. *Id.* § 3-102(a).

116. See *id.* § 3-102(a)(3).

117. See *id.* § 3-102(a)(3)(ii). Should the balance be less than \$25,000, the spouse receives the full amount. *Id.*

118. See *id.* § 3-102(a)(3)(iii).

119. See *id.* § 3-103.

120. *Id.* § 3-102(a)(4).

121. See *id.* § 3-104.

122. *Id.* § 3-103.

123. *Id.* § 3-103(2).

124. *Id.*

creates inter vivos trusts. This section is designed for elderly persons who desire management of their assets for their own benefit.<sup>125</sup>

The terms of the short form trust section are also incorporated by reference.<sup>126</sup> The transferor places property in trust during his own lifetime and the trustee pays out sufficient income and principal for the support, education, care, and benefit of the transferor and his dependents.<sup>127</sup> At the death of the transferor, the trust property passes to his estate.<sup>128</sup> The transferor may revoke the trust at any time by written notice to the trustee.<sup>129</sup> The trustee may resign or the transferor may remove him upon written notice.<sup>130</sup>

The short form trust incorporates the statutory list of trustee powers.<sup>131</sup> The trustee need not post bond unless required to either by a provision in the document or by a court based upon the application of an interested person who shows good cause.<sup>132</sup> Should the transferor become incapacitated, the trustee may request court authority to continue to administer the trust in the same manner as a guardian or conservator.<sup>133</sup> This last provision is extremely important as it is functionally similar to a durable power of attorney. In states that do not permit such a power, this clause gives a transferor the opportunity to designate the terms of the disposition of his property that would take effect should he become incompetent.<sup>134</sup>

The statutory will and short form sections incorporate the statutory list of trustee powers in the 1980 ABA Committee Draft.<sup>135</sup> The list of powers may be adopted with these other sections of the 1980 ABA Committee Draft or separately adopted by any jurisdiction.<sup>136</sup> The trustee's powers are similar to those provided in the USWA, but are broader in practice because they may be used in inter vivos trusts.<sup>137</sup> Massachusetts has recently enacted this part of

---

125. See *Proposed Uniform Acts*, *supra* note 3, at 839.

126. See UNIF. STATUTORY CUSTODIANSHIP TR. ACT § 2-102 (ABA Comm. Draft 1980).

127. See *id.* § 3-101.

128. See *id.*

129. *Id.* § 3-102.

130. *Id.* § 3-104.

131. See *id.* § 4-102 (incorporating trust powers granted in UNIF. SHORT FORM CLAUSES FOR WILLS AND TR. ACT § 3-101 (ABA Comm. Draft 1980)).

132. *Id.* § 4-102.

133. See *id.* § 4-103.

134. See *Proposed Uniform Acts*, *supra* note 3, at 839.

135. See *supra* note 131.

136. See *Proposed Uniform Acts*, *supra* note 3, at 839-40.

137. UNIF. SHORT FORM CLAUSES FOR WILLS AND TR. ACT § 3-101 (ABA Comm. Draft 1980).

the 1980 ABA Committee Draft.<sup>138</sup>

#### D. *The English Statutory Will*

England has had a statutory will since 1925, when the Law of Property Act empowered the Lord Chancellor to promulgate statutory forms for wills.<sup>139</sup> The Statutory Will Forms are divided into two groups: part I, containing forms that may be incorporated by general reference, and part II, containing forms that may only be incorporated by specific reference.<sup>140</sup>

Part I contains six forms that are designed to expedite the administration of the estate by setting forth procedures, definitions, terms, and powers.<sup>141</sup> The four forms in part II describe a number of trusts, and, under the scheme set forth in this statute, the testator may choose the type of trust that he wishes to use.<sup>142</sup> These forms are followed by sample clauses which enable the testator to incorporate one or more of the forms found in parts I and II into his will. These clauses are not the only method by which the statutory forms may be incorporated; however, they provide a brief and certain means for doing so.<sup>143</sup> For example, to incorporate the part I forms, the testator need only write, "All the forms contained in Part I of the Statutory Will Forms, 1925, are incorporated in my will."<sup>144</sup> The testator may modify any incorporated form by adding the words, "Subject to the following modifications, namely . . . ."<sup>145</sup>

The substance of the forms has only limited application to American statutory wills because of the different legal context.<sup>146</sup> For example, the forms do not contain provisions for distribution except in the case of a termination of the trust.<sup>147</sup> The terms explain the method of determining the type and extent of property

---

138. MASS. GEN. LAWS ANN. ch. 184B, § 2 (West Supp. 1984-1985).

139.

The Lord Chancellor may from time to time prescribe and publish forms to which a testator may refer in his will, and give directions as to the manner in which they may be referred to, but, unless so referred to, such forms shall not be deemed to be incorporated in a will.

Law of Property Act, 1925, 15 & 16 Geo. 5, ch. 20, § 179.

140. 23 HALSBURY'S STATUTORY INSTRUMENTS 292 (3d ed. 1977).

141. *Id.* at 293-96.

142. *Id.* at 296-301.

143. *See id.* at 300-01.

144. *Id.* at 300.

145. *Id.*

146. *See, e.g., id.* at 293 form 2 (defining "personal chattels").

147. *Id.* forms 7-10.

and describe the executor's duties, but they do not define who may take under the will.<sup>148</sup> The terms "child" and "spouse," for example, are not defined.<sup>149</sup> Unlike the American proposals, the English will, at least on its own, does not offer a distribution scheme separate from that prescribed for intestacy. In spite of substantive gaps, however, the unique format of the English statutory will offers valuable perspective for a comparison of the American proposals. At least for the purposes of this Note, then, the importance of the English statutory will lies in its structure.

## II. CONTRIBUTIONS OF THE PROPOSALS

Every state, through its intestacy statute, provides a testamentary scheme for disposing of the property of persons who die without a will.<sup>150</sup> If a person does not wish to have his property distributed according to the intestacy statute, he must either execute a will or use a will substitute. A testator may write the will himself, but risks imprecision and possible invalidity if he fails to follow the legal requirements. He may also seek legal assistance, but this alternative entails greater costs. It is therefore the purpose of the statutory will to provide some other practical alternative.

This section of the Note sets forth some of the concerns that must be taken into account in the drafting of a statutory will. As a starting point, the legislature must assess the contributions of the proposed statute in light of provisions already contained in the intestacy statute. It must also consider whether ordinary use of the proposed statute would require legal advice. The will must also have the simplicity and flexibility required for broad application yet retain sufficient precision to carry out the testator's wishes. Finally, a legislature must inquire into the impact that the proposed statute is likely to have on the legal profession. The extent to which a statutory will is successful depends largely upon its ability to answer these questions.

---

148. Directions to those carrying out the will provisions are set out in form 3 (inventories and provisions respecting chattels), form 4 (charities), and form 5 (directions respecting annuities). *Id.*

149. *See id.*

150. *See* T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 14 (2d ed. 1953). *See generally* R. LYNN, AN INTRODUCTION TO ESTATE PLANNING 21-22 (1975); R. LYNN, INTRODUCTION TO ESTATE PLANNING IN A NUTSHELL § 2.5 (1983) (general discussion of intestacy statutes).

### A. *Substantive Value of the Proposals*

The law of wills ultimately seeks to discover the testator's intent.<sup>151</sup> A statutory will, by its approach and substance, must strive to best realize that intent. The form of the statute may help by making the provisions readily understandable by the testator or by facilitating the attorney's drafting of the will. Its substance should provide clauses which will likely carry out a testator's intent, even if that intent conflicts with other public policies. The will must also present an alternative which differs from the intestacy statute sufficiently to warrant its selection.

#### 1. *Alternatives Provided by the Wills*

Two aspects of a statutory will directly affect its usefulness. First, its approach determines which individuals may use it and in what situations it may apply. Second, its substance, including definitions, distribution schemes, and application, determines the extent of its usefulness and acceptance.

The differing approaches require little discussion. California, desiring a good "poor man's" will, enacted a simple form that allows the testator to make a few clearcut choices.<sup>152</sup> The USWA, whose application should extend to larger estates,<sup>153</sup> uses a more sophisticated incorporation-by-reference format. Instead of providing a series of choices, the USWA permits the drafting attorney to amend the provisions through changes on the document that incorporate the terms of the USWA.<sup>154</sup> Similarly, the 1980 ABA Committee Draft provides no explicit choices but ensures flexibility through incorporation by reference.<sup>155</sup> The applicability of the 1980 ABA Committee Draft is further enhanced by its clear divisibility, its ability to distribute larger testamentary estates, and its provisions for inter vivos transfers.<sup>156</sup> It also provides an inter vivos trust, but this trust has little value as a means of making a testamentary transfer.<sup>157</sup> The English will uses two sets of forms, all incor-

---

151. See T. ATKINSON, *supra* note 150, § 146; Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975).

152. The most important choice is the exclusion of the spouse in the disposition of the probate estate. See *supra* notes 33, 37 and accompanying text.

153. For example, where the testator has surviving issue, the spouse under the USWA receives the testator's personal property and residence and the next \$300,000 of the balance. UNIF. STATUTORY WILL ACT § 5(a)(2).

154. See *supra* note 55 and accompanying text.

155. See *supra* note 108 and accompanying text.

156. See *supra* notes 136-37 and accompanying text.

157. See *supra* notes 125-30 and accompanying text.



porated by reference, which can define the details of a will or give the testator choices regarding the type of trust he will use.<sup>158</sup> Unlike intestacy statutes, each of these proposals must be executed with the same formalities as an ordinary will.<sup>159</sup>

A comparison of the substance of the wills is difficult because their provisions are not parallel. Nonetheless, it is possible to compare the four proposals with respect to their attempts to realize a testator's likely intent. This Note's comparison focuses on the features of the statutory wills that best demonstrate an ability to carry out such an intent: definitions of terms, methods of distribution, and trust provisions. Inasmuch as the English statutory will contains few substantive provisions, this comparison largely focuses on the three American systems.

The proposals first differ in their definitions of several important terms. One difference concerns the designation of who may take as a spouse. While California defines a spouse as the testator's husband or wife at the time of execution,<sup>160</sup> the 1980 ABA Committee Draft does not define the term at all, leaving it to other sources of probate law to make that determination. If a Uniform Probate Code jurisdiction enacted the 1980 ABA Committee Draft, that Code would define the term "spouse" for purposes of a will. Thus under the 1980 ABA Committee Draft, the term "spouse" would exclude certain persons technically married to the testator.<sup>161</sup> The USWA goes one step further by excluding spouses who are parties to a decree of separation.<sup>162</sup> Though the California rule is probably easier to administer, the Uniform Probate Code, through the 1980 ABA Committee Draft, probably comes closer to realizing the likely intent of a testator, and the USWA closer still.<sup>163</sup>

The proposals also differ in their definition of the term "survival." The 1980 ABA Committee Draft defines survival to mean that a person survives the testator by at least 120 hours.<sup>164</sup> The CSW, by contrast, leaves the determination of the length of time necessary for survival to other sources of probate law. Thus, in California, through application of the California Probate Code, no time period is necessary for survival. The USWA defines survival as

---

158. See *supra* notes 141-45 and accompanying text.

159. See, e.g., CAL. PROB. CODE § 56(2); UNIF. STATUTORY WILL ACT § 2; UNIF. STATUTORY WILL ACT § 2-101 (ABA Comm. Draft 1980).

160. See *supra* note 22 and accompanying text.

161. See *supra* note 113 and accompanying text.

162. See *supra* note 59 and accompanying text.

163. See *supra* note 110 and accompanying text.

164. See *supra* note 26 and accompanying text.

thirty days.<sup>165</sup> Extending the survival period avoids multiple probate in a situation where, for example, a husband and wife are in an automobile accident, the husband dies instantly, and the wife dies on her way to the hospital. Without a survival rule like the USWA's, the wife's share would be probated through the husband's will, and then through her own will. Manifestly, treating the wife as if she had predeceased the husband would not deprive her of enjoyment of the property. Moreover, avoiding multiple probate would speed distribution to other devisees at lower cost.

The definitions of the term "child" also vary. Each of the proposals treats adoptees as children.<sup>166</sup> The CSW expressly includes nonmarital children, while the 1980 ABA Committee Draft is silent on this point.<sup>167</sup> The USWA, on the other hand, requires that the father openly and notoriously treat them as his children if they are to be considered his children.<sup>168</sup>

Methods of distribution are a second substantive area in which the drafters of statutory wills have attempted to anticipate a testator's probable desire. The 1980 ABA Committee Draft distributes property per stirpes when taking by representation is required.<sup>169</sup> Thus, in contrast to the system adopted in the Uniform Probate Code, generations without any surviving members will be considered under the will.<sup>170</sup> The CSW and the USWA follow the Uniform Probate Code in terms of skipping generations without any surviving members.<sup>171</sup> It should be noted, however, that the 1983 USWA Discussion Draft adopted the per capita at each generation division suggested by Professor Waggoner.<sup>172</sup> According to Waggoner, this method is more likely to correspond to the intention of

---

165. See *supra* note 63 and accompanying text.

166. See CAL. PROB. CODE § 56(f)(1), *supra* notes 61, 111 and accompanying text.

167. See *supra* notes 23, 111 and accompanying text.

168. See *supra* note 60 and accompanying text.

169. See *supra* note 112 and accompanying text.

170. *Id.*

171. See *supra* note 25 and accompanying text (CSW), note 62 and accompanying text (USWA).

172. See UNIF. STATUTORY WILL ACT § 2-104 (Discussion Draft 1983); Waggoner, *A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants*, 66 NW. U.L. REV. 626 (1971). Waggoner reasoned that because testators generally want their children treated equally, they probably want their more remote descendants treated equally. He proposed that § 2-106 of the Uniform Probate Code be modified as follows:

If per capita at each generation is called for by this Code, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship which contains any surviving heirs and deceased persons in the same degree who left issue who survive the decedent. Each surviving heir in the nearest degree containing any surviving heirs is allocated only one share and the remainder of the estate is divided

the testator.<sup>173</sup>

Another point of analysis concerning distribution involves the portion of testamentary estate which the spouse is to receive. Only the CSW specifically allows the choice of spouse exclusion.<sup>174</sup> Also, the CSW is the only will that expressly allows a cash gift.<sup>175</sup> The statutes vary on the proportion of the estate kept by the spouse, whether by amount, fraction, or description.

In the area of trusts, each of the three American statutes offers its own approach. The trustee possesses similar powers under the USWA and the 1980 ABA Committee Draft.<sup>176</sup> The drafters of the CSWA, by contrast, preferred a less extensive list of trustee powers;<sup>177</sup> a long and complicated enumeration of trustee powers would be inconsistent with the general simplicity of the California will.

Although a statutory will may realize the testator's intent, its usefulness is diminished to the extent that it duplicates the intestacy statute. The CSW gives the testator several alternatives that are not available under intestate succession. These include a trust, cash gift, and disinheritance of the spouse. The testator may also select the executor, guardian, and trustee. Each of these persons is selected according to the same method, thereby keeping separate definitions to a minimum.<sup>178</sup> On balance, the CSWA may be considered a simple alternative to intestacy. Its terms act primarily as a simple will, providing an easy means of avoiding intestacy. The statute has little application in the drafting of more complicated wills.

The USWA, like intestacy, sets up a single testamentary scheme. A testator may alter the plan, however, through amendments to the document incorporating the USWA.<sup>179</sup> The USWA also provides several definitions that differ from those used in intestate succession, most notably of the terms "spouse" and "child."<sup>180</sup> The flexible trust provisions are a useful addition to the will.<sup>181</sup> Like the CSW, the USWA provides an easy method of avoiding intestacy.

---

in the same manner as if the heirs already allocated a share and their descendants had predeceased the decedent.

*Id.* at 633 n.17.

173. See Waggoner, *supra* note 172, at 633.

174. See *supra* note 37 and accompanying text.

175. See *supra* note 30 and accompanying text.

176. See *supra* note 137 and accompanying text.

177. See *supra* note 43 and accompanying text.

178. See *supra* notes 44-48 and accompanying text.

179. See *supra* notes 56-58 and accompanying text.

180. See *supra* notes 59-61 and accompanying text.

181. See *supra* notes 78-106 and accompanying text.

The 1980 ABA Committee Draft, though similar to the USWA in many respects and similar to intestacy in the definitions that it uses, remains an identifiably different proposal. It offers a unique distribution scheme, a separate custodianship trust, and a useful set of trustee powers. The 1980 ABA Committee Draft possesses three advantages that broaden its application. First, its divisibility allows a jurisdiction to use or enact only one provision, as Massachusetts has recently done.<sup>182</sup> Second, it provides an inter vivos trust that may be used in certain circumstances.<sup>183</sup> Finally, its terms may be applied to inter vivos trusts as well,<sup>184</sup> permitting application of the 1980 ABA Committee Draft beyond testamentary transfers. Not only could the 1980 ABA Committee Draft provide a simple way to make a will, but it could also aid in the drafting of more complex wills. For example, a testator or his attorney could adopt his own testamentary scheme, but direct that the trustee have the powers delineated in the Draft's statutory list of trustee powers.

## 2. *Desirability to the Public*

Public opinion plays a significant role in evaluating the perceived usefulness of an intestacy statute; it is of vital importance also in formulating and evaluating a statutory will because of the paramount importance of the testator's intent. After all, a statutory will must reflect the wishes of the maker of the will.

In 1978, the American Bar Foundation Research Journal published a study on public attitudes towards intestate succession.<sup>185</sup> The results of this study showed that most people prefer to have their property distributed at their death. Moreover, the study confirmed the strong spousal preference echoed in many intestacy statutes. Most people desire to leave their estate to their spouses, even if they are survived by their parents or children as well.<sup>186</sup> However, where the testator's children are stepchildren of the spouse, respondents were somewhat less likely to favor leaving the entire estate to the spouse. While most of the respondents indicated a preference for leaving a majority of their estate to their spouse, over three-fourths believed that the children should receive at least some

---

182. See *supra* note 138 and accompanying text.

183. See *supra* note 136 and accompanying text.

184. See *supra* notes 125-38 and accompanying text.

185. Fellows, Simon & Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RESEARCH J. 319 (1978).

186. See *id.* at 348-64.

portion of the estate.<sup>187</sup>

The 1980 ABA Committee Draft takes this difference into consideration by providing one distribution scheme for the situation where children of the testator are also the children of the spouse, and another for cases where the children of the testator are stepchildren of the spouse.<sup>188</sup> In contrast, the distribution schemes promulgated by the USWA and the CSW do not differentiate between these two situations.<sup>189</sup> Given the growing number of families with offspring from prior marriages and popular opinion toward their treatment in distribution, perhaps statutory wills should provide alternative schemes.

The study found that a substantial majority of respondents believed that nonmarital children should be treated as children once paternity is established.<sup>190</sup> Each of the three American statutes is in accord with this thinking.<sup>191</sup> But the study failed to inquire about the preferred means of establishing paternity.<sup>192</sup> Inasmuch as this is where the proposals differ, the study gives no guidance in assessing whether any of the proposals' paternity provisions comport with public attitudes.

The examination of the public's views regarding division by representation revealed a virtual rejection of distribution per stirpes.<sup>193</sup> The study suggested the desirability of a system where issue of equal relation take equally.<sup>194</sup> These results, according to the study's authors, demonstrate the validity of the Waggoner proposed changes to the Uniform Probate Code.<sup>195</sup> The results of the study indicate that the 1980 ABA Committee Draft distribution per stirpes is unlikely to produce the results that the testator intended. The division

---

187. See *id.* at 364-68.

188. UNIF. STATUTORY WILL ACT § 3-102(a)(4) (ABA Comm. Draft 1980).

189. Under the CSW, the testator may exclude the spouse. See *supra* note 33 and accompanying text.

190. See Fellows, Simon & Rau, *supra* note 185, at 369-73.

191. The proposals reach this result by different paths. The CSW expressly includes nonmarital children. See *supra* note 23 and accompanying text. The 1980 ABA Committee Draft is silent on the issue. See *supra* note 111 and accompanying text. The USWA achieves the same end through its system of equal distribution where the child is treated openly and notoriously by the father as his child. See *supra* note 60 and accompanying text.

192. The study does explain, however, why certain statutes requiring proof of paternity would be unconstitutional, and it discusses public opinion towards equal treatment once paternity is proven. On the other hand, it does not inquire as to the standard that should be used to prove paternity. See Fellows, Simon & Rau, *supra* note 185, at 370-72.

193. *Id.* at 384. See also *supra* note 112 and accompanying text (discussing per stirpes proposal).

194. See Fellows, Simon & Rau, *supra* note 185, at 384.

195. *Id.*

that is espoused by the Uniform Probate Code, the CSW, and the USWA comes closer to the probable intent of a testator because distributions skip generations with no surviving members. Division of property per capita at each generation is the scheme that is apparently most favored by the public, yet none of the proposals take that approach.

### B. *Quality of Drafting*

A well-designed statutory will proposal should simplify the creation of wills and trusts. The benefits of simplification, however, must be balanced against the dangers arising from a lack of precision. Thus, whether a statutory will is successful depends upon how well it strikes a proper balance between the simplicity and precision that are appropriate for the type of testator most likely to use the will.<sup>196</sup>

The drafters of the CSW designed a very uncomplicated and readily comprehensible will.<sup>197</sup> It is precise in the sense that the testator probably understands how his estate will be distributed, and thus he may be said to intend distribution to occur in that manner. But the CSW limits the number of distribution schemes to a few simple alternatives which have little application outside the limits of the will. The USWA is more detailed but less easily interpreted.<sup>198</sup> It simplifies will drafting by setting up a system in which the testator incorporates complex provisions by reference. Testators can incorporate individual sections or modify sections to meet their specific needs. While the precision of the will is not sacrificed, the testator is not burdened by unwieldy terms because they are simply included in his will by reference.<sup>199</sup> The advantage of the 1980 ABA Committee Draft distribution scheme is that it is not confined solely to testamentary transfer situations. Also, the 1980 ABA Committee Draft's treatment of trustee powers can simplify the appearance and drafting of longer wills. Its application, then, is much broader than that of the other proposals, as Massachusetts'

---

196. This discussion presupposes the importance and relevance of simplicity and precision. For a discussion of the benefits of each and an example of a proper balance between the two, see Squires & Muckelstone, *A Simple "Simple" Will*, 57 WASH. L. REV. 461 (1982).

197. For example, the declaration and revocation reads, "This is my will and I revoke any prior wills and codicils." CAL. PROB. CODE § 56.7 art. 1 (West Supp. 1984). The CSW provides instructions throughout the form for the completion of each term.

198. The USWA is less likely to require simple language because the terms do not appear on a form, and laymen are not likely to read the statute without the aid of an attorney. See *supra* note 54 and accompanying text.

199. See *supra* note 55 and accompanying text.

enactment of the trust provisions indicates.<sup>200</sup> The English statutory will, through its set of ten forms, attempts to assist generally in the creation and administration of wills. The inclusion of the forms in a will allows for the expression of important terms within a relatively small space.<sup>201</sup> The forms pertaining to the trust provisions give the testator choices and are thus more likely to reflect his intent.

### C. *Impact on the Legal Profession*

The statutory will could affect the legal profession by substitution, enhancement, or protection. Those completing the form-like California will may decide not to consult an attorney. Also, if the proposals succeed in reducing complexity, lawyers should need less time to draft wills. On the other hand, the availability of a statutory will may encourage those without wills to have one prepared.<sup>202</sup> By handling cumbersome details legislatively, the statutory will could leave the attorney more time to devote to planning or other matters. A statutory will could also serve to reduce the probability of malpractice claims arising from the drafting of wills.

The CSW is likely to have the greatest impact on the legal profession. A person who follows the instructions provided on the form can easily complete the will without legal assistance.<sup>203</sup> Perhaps realizing this possibility, the legislature supplied warnings to the effect that the testator should seek the assistance of a lawyer in certain instances.<sup>204</sup> By comparison, the other proposals are more likely to require a lawyer's assistance. While the language of the USWA and the 1980 ABA Committee Draft may be quite clear to the lawyer or educated layman, it would probably intimidate the average person.

Each of the proposals could enhance the lawyer's role. The existence of comprehensive wills may encourage more people to

---

200. See *supra* note 138 and accompanying text. Connecticut, too, has enacted a set of statutory powers which may be incorporated by reference. The Connecticut Act lists 37 fiduciary powers and gives immunity to the trustee in all instances except those involving bad faith, willful misconduct, or gross negligence. CONN. GEN. STAT. ANN. §§ 45-100d to 45-100g (West 1981 & Supp. 1984). The Uniform Probate Code provides a place to include such a list. UNIF. PROB. CODE art. 7, pt. 4 comment (1982).

201. See *supra* notes 140-45 and accompanying text.

202. See *California First With Statutory Wills*, *supra* note 13.

203. While the statute itself does not provide instructions, a set of instructions accompany the printed will form distributed by the State Bar of California (on file with the *Case Western Reserve Law Review*).

204. See *supra* notes 18-20 and accompanying text. One of the warnings suggests getting the help of a "competent tax advisor"; such an advisor is likely to be a lawyer. *Id.*

complete a will rather than die intestate.<sup>205</sup> Many potential testators might heed the suggestions on the CSW printed form will and seek legal advice. Some would likely find that they need minor amendments or more advanced planning. The more complex proposals, which incorporate terms by reference, allow lawyers to draft wills for clients who neither need nor can afford a more sophisticated will. For the client who needs a more personalized scheme, the use of a shorthand list of powers, such as that adopted in the Massachusetts statute, permits the attorney to spend more time on important matters. In short, a better will could be drafted at lower cost to the client.

The protective value of the four statutory wills is questionable. Each proposal would help prevent simple mistakes arising from the copying of definitions and descriptions. The CSW will benefit those who complete the form without a lawyer's assistance. Although a will drafted with legal advice may offer the best protection for a testator, a statutory will is less likely to end up in court than is either a holographic will, or one that the testator has simply drafted himself. However, none of the statutory wills can be of help where an attorney suggests an inappropriate scheme or incorrectly identifies a donee.<sup>206</sup>

### III. PROPOSED CHANGES

This section of the Note discusses the problems associated with uniform statutory wills and proposes an alternative that synthesizes the better features of each proposal. It also suggests other means by which the same goals may be achieved.

#### A. *Difficulties in Designing a Uniform Statute*

Any uniform statute must overcome the obstacle of addressing the differing needs, attitudes, and wishes of individuals as well as the statutory and common law requirements of all fifty jurisdictions. This is especially true in the case of the statutory will. As the American Bar Foundation study showed, not all jurisdictions hold

---

205. See Kellogg, *Adapting Your Practice to the New Statutory Wills*, 3 CAL. LAW. 14 (1983).

206. See, for example, *Ventura County Humane Soc'y v. Holloway*, 40 Cal. App. 3d 897, 115 Cal. Rptr. 464 (1974), where the attorney did not properly identify the charity to receive the gift. The charity was successful in an attorney malpractice action to recover the cost of litigation resulting from the uncertainty. This same error could occur in the designation of a cash gift in the California will. See *supra* note 30 and accompanying text.



the same view on matters of testamentary disposition.<sup>207</sup> A major advantage a statutory will provides is the set of options that are different from those found in intestacy.<sup>208</sup> Consequently, a uniform statutory will must take into account fifty separate intestacy statutes. Other statutes, especially those that protect the interests of spouses and children, may influence the shaping of a statutory will.<sup>209</sup> In short, any effort to create a uniform statutory will must consider a number of practical requirements and public perceptions that are not necessarily congruous. Moreover, it must propose a system for distribution that goes beyond the intestacy statutes and that works in concert with other relevant bodies of law.

### B. *Proposed Form*

The concept of a statutory will is similar to the idea which underlies the Uniform Gifts to Minors Act (UGMA).<sup>210</sup> Prior to the UGMA, persons wishing to make gifts to minors had to choose between three basic and often cumbersome arrangements. First, the donor could make an outright gift to the minor, and handle the transaction informally. Second, the donor could make a gift to the minor, but a court-appointed guardian would control the gift. Third, the donor could create an inter vivos trust for the benefit of the minor.<sup>211</sup> Such transactions were surrounded by uncertainty, however, because of the minor's unique ability to affirm or disaffirm the gift upon reaching majority.<sup>212</sup>

The UGMA sought to provide an easier, more effective means for making a gift to a minor. The UGMA defines those persons who may give and receive such gifts, and it creates a custodial relationship over the gift until the child attains majority. A donor may make a gift under UGMA simply by filling in a short form that is contained within the statute itself.<sup>213</sup>

---

207. The report studied Alabama, California, Massachusetts, Ohio, and Texas. There were slightly different results in each jurisdiction. Fellows, Simon & Rau, *supra* note 185.

208. See *supra* notes 178-84 and accompanying text.

209. For instance, community property laws, child support laws, and laws permitting more property to be placed in nonprobate assets.

210. UNIF. GIFTS TO MINORS ACT (1966). There are, of course, many other uniform acts that attempt to simplify complex or uncertain transfers of property. See, e.g., UNIF. Durable Power of Attorney Act (1979); UNIF. FEDERAL LIEN REGISTRATION ACT § 3 (1978); UNIF. DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT (1978); UNIF. ANATOMICAL GIFT ACT (1968). The UGMA perhaps provides the best analogy to a statutory will for purposes of this Note.

211. Browning, *Gifts to Minors*, 27 CONN. B.J. 407 (1953).

212. *Id.* at 407-08.

213. UNIF. GIFTS TO MINORS ACT § 2(a)(2)-(3).

The UGMA has been enacted in almost every state.<sup>214</sup> Despite some criticism of certain terms used in the statute,<sup>215</sup> its wide acceptance speaks well for its success. Commentators agree that it has simplified gifts of stocks to minors.<sup>216</sup> Some have suggested that the UGMA, which applies only to inter vivos transfers, should be extended to cover testamentary transfers because it offers an unusually efficient statutory scheme.<sup>217</sup>

The widespread use and broad acceptance of the UGMA suggests that a similar effort based upon the UGMA model in the area of testamentary transfers may also succeed. Although the two sorts of transfers are not completely analogous,<sup>218</sup> the UGMA demonstrates that the problem of cumbersome transfers may be resolved by using a short form that incorporates more complex terms by reference.

The English statutory will provides a model for the adaptability of forms.<sup>219</sup> The first six forms given in the statute apply to the majority of wills, while the testator who wishes to add trust provisions may choose an appropriate set of provisions from among four additional forms.<sup>220</sup> Thus, a statute may provide choices even though it operates through incorporation by reference.

It is desirable that the statutory will provide the testator with specific language by which he can incorporate the provisions he wants. Moreover, it is important that the testator know what his will says. A well-drafted form would take care of these considerations. Warnings could both discourage self-help and alert those bent on self-help to its dangers. Even a form completed without a lawyer, however, is better than a will written entirely by a layman.<sup>221</sup> Choice could be preserved by allowing the incorporation of selected provisions or sections, as the English will does. The vari-

---

214. 8A U.L.A. 317 (1983).

215. *E.g.*, Mahoney, *The Uniform Gifts to Minors Act: A Patent Ambiguity*, 36 VAND. L. REV. 495 (1981) (criticizing the UGMA for its inconsistencies; for instance, one section provides that only the minor has any beneficial interest in the property, but another section authorizes a custodian to use the funds to discharge support obligations).

216. *See, e.g.*, Ayres, *Gifts to Minors*, 30 TENN. L. REV. 232 (1963); Newman, *The Uniform Gifts to Minors Act in New York and Other Jurisdictions—Tax Consequences, Possible Abuses, and Recommendations*, 49 CORNELL L. REV. 12 (1963).

217. Newman, *supra* note 216, at 33.

218. For example, the terms of the USWA or CSW could be rewritten as a will and probated, whereas before enactment of the UGMA, the custodial relationship could not be created.

219. *See supra* notes 139-45 and accompanying text.

220. *See id.*

221. *California First With Statutory Wills, supra* note 13.

ous sections, rather than merely being numbered, could be named to reflect their general themes. For example, to give the choice of spouse exclusion for the trust, the printed form could provide space to indicate the language "with spouse preference" or "without spouse preference." The different choices would activate different methods for distribution and thereby effect the testator's intent, while at the same time preserving the simplicity of the document.

A statutory will act should also be divisible. Like the English will, such a statute would serve primarily as a mechanism by which to create a comprehensive will with distribution, trust, and interpretation provisions. The divisible sections would also serve as useful components in drafting larger documents, particularly when the testator's needs require the adoption of only specific portions of the statutory will. It is apparent that the drafters of the USWA realized this when they reorganized the proposal from its 1983 Discussion Draft form, which resembled the organization of the Uniform Probate Code, to a simpler consecutive numbering of sections.<sup>222</sup> Although the USWA sections only apply to testamentary transfers,<sup>223</sup> divisibility could expand their application to inter vivos transfers and to every type of will.

### C. *Proposed Substance*

The results of the American Bar Foundation study on public opinion toward the testamentary disposition indicate that most testators favor the substantive provisions of the USWA.<sup>224</sup> Moreover, this preference would appear to be grounded in common sense. The drafters of the USWA, recognizing that the statutory will was a powerful medium through which to effect change, drafted a statute that contained certain innovative definitions.<sup>225</sup> At a minimum, a statutory will should embody the substantive provisions of the USWA, but in a flexible form.

The USWA 1983 Discussion Draft embodied some terms of even greater value. For example, it prescribed division per capita at each generation.<sup>226</sup> Division according to this rule would effectively im-

---

222. Compare UNIF. STATUTORY WILL ACT (Discussion Draft 1983) *passim* and UNIF. PROB. CODE *passim* with UNIF. STATUTORY WILL ACT *passim*.

223. UNIF. STATUTORY WILL ACT § 3.

224. See *supra* notes 185-95 and accompanying text.

225. See *supra* notes 59-64 and accompanying text. But see *infra* notes 226-27 and accompanying text.

226. See UNIF. STATUTORY WILL ACT § 2-104 (Discussion Draft 1983). See also *supra* note 172 and accompanying text (discussing Waggoner proposal).

plement the testator's wishes.<sup>227</sup> In enacting a statutory will, a legislature should give serious consideration to this definition because it is a more truthful reflection of a testator's desires than definitions provided by other proposals.

#### D. *Alternative Approaches*

The statutory will is a response to the rising cost and complexity of testamentary planning. The proposals discussed in this Note attempt to create a simpler and more cost-efficient method of testamentary transfers. But the statutory will is not the only means by which to achieve these objectives. Legislatures could instead prescribe will substitutes or make compliance with the formalities of will drafting less rigid.

A revocable inter vivos declaration of trust, though a radical step, might be an even better means of effectuating the goals of a statutory will. The short form trust section of the 1980 ABA Committee Draft is such a trust, but is intended primarily as a means to avoid the trauma associated with the court appointment of a guardian. A broader inter vivos trust with a distribution scheme in the event of death of the beneficiary would yield several benefits. It would make possible an improved insurance collection and distribution procedure, a choice of jurisdiction, tax benefits, and easier modification and revocation.<sup>228</sup> Moreover, a revocable inter vivos trust would bypass probate, thereby assuring privacy and lower costs.<sup>229</sup> The provisions of the current statutory will proposals could provide valuable distribution schemes for successor beneficiaries when the maker of the trust dies.

Such a statutory trust would not necessarily be difficult either to use or to enact. The UGMA, for example, created an entirely new type of transfer and has since gained wide acceptance.<sup>230</sup> Revocable inter vivos trusts already exist and have been in use for some time.<sup>231</sup> Though the drafting of a living trust is a serious matter, it is no more so than the writing of a will. The maker of such a trust could consult an attorney regarding the potential consequences of the trust, just as he would regarding the drafting of a USWA, 1980 ABA Committee Draft, or English statutory will.

---

227. See *supra* note 195 and accompanying text.

228. See J. CORCORAN, *ALTERNATIVES TO PROBATE* § 19.8 (1971).

229. *Id.*

230. See *supra* notes 210-17 and accompanying text.

231. An example is the so-called Dacey trust. N. DACEY, *HOW TO AVOID PROBATE* (1965). See also Langbein, *supra* note 151, at 505.

A second alternative approach focuses on relaxing the formalities of will execution after drafting defects are discovered. Professor Langbein has suggested analyzing defective will execution in terms of the purposes of the requirements.<sup>232</sup> By looking at the will execution in light of cautionary,<sup>233</sup> channeling,<sup>234</sup> evidentiary,<sup>235</sup> and protective<sup>236</sup> functions, a court could find the formalities of execution lacking, yet still uphold the will because the reasons behind the formalities are fulfilled.<sup>237</sup> The adoption of this approach would mitigate the harsh effects of faulty execution and would prevent the needless striking down of wills when the testator's intent is unquestioned, even though some technical requirement remains unfulfilled. Such an approach, which might be introduced either by a legislature or by a court, would realize the goals of a statutory will by permitting a court to carry out the testator's intent despite a failure to complete the formal requirements.

### CONCLUSION

A statutory will can provide a viable option both to intestacy and to extensive legal assistance. The four proposals work toward this end, but each one is to some extent flawed because of the narrowness of its application or because it fails to go far enough in addressing the problems inherent in the traditional approaches.

The precise impact of a statutory will is largely a function of how well it can be adapted to a variety of situations. Though each of the different proposals has advantages and disadvantages, a series of provisions along the lines of the USWA, incorporated by reference, would produce the greatest flexibility and widest application. Many of the goals of a statutory will could also be met by alternative means, such as a statutory revocable living trust, or Professor Langbein's functional analysis of formalities in the making of wills.

GREGORY V. MERSOL

---

232. Langbein, *supra* note 151, *passim*.

233. *Id.* at 517. The purpose of the cautionary function is to impress upon the testator the solemnity of the event so that he gives his will careful consideration. *Id.* at 494-95.

234. *Id.* at 523. The term "channeling" refers to a standardization for the purpose of determining whether the testator intended the document as a will. *Id.* at 493-94.

235. *Id.* at 517. The evidentiary function refers to the capacity of a document to give a court reliable evidence regarding the testator's intent. *Id.* at 492.

236. *Id.* at 516. The purpose of the protective function is to prevent fraud or deceit in the making or production of a will. *Id.* at 496.

237. *Id.* at 515.